

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDRY K. RAMIREZ	:	DETERMINATION
	:	DTA NO. 822192
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Year 2004.	:	

Petitioner, Andry K. Ramirez, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2004.

On August 14, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion were the affidavit of John E. Matthews, dated August 13, 2008, and annexed exhibits supporting the motion. Petitioner, appearing pro se, had until September 15, 2008 to file a response but failed to do so. Thus, that date commenced the 90-day period for the issuance of this determination. After due consideration of the submissions by the Division of Taxation, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because there are no disputed facts and, as a matter of law, such facts mandate a determination in its favor.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Andry K. Ramirez, a Notice of Deficiency, dated July 23, 2007, bearing assessment number L-028450344-7. The notice was mailed to petitioner at 185 Jerome Street 1, Brooklyn, New York 11207. The notice asserted a total New York State and New York City personal income tax deficiency of \$764.50, plus interest, for the year 2004. Petitioner protested this notice by a Request for Conciliation Conference, filed on February 1, 2008 with the Division's Bureau of Conciliation and Mediation Services (BCMS).

2. On February 15, 2008, BCMS issued a Conciliation Order Dismissing Request to petitioner. That order determined that petitioner's protest of the subject notice was untimely and stated, in relevant part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on July 23, 2007, but the request was not received until February 1, 2008, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

Petitioner filed a timely protest to the Conciliation Order on March 28, 2008.

3. To show proof of proper mailing of the July 23, 2007 notice, the Division provided the following with its motion papers: (i) an affidavit, dated August 12, 2008, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated August 12, 2008, of James Steven VanDerzee, the mail and supply supervisor of the staff of the Division's mail processing center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 23, 2007; and (iv) the electronic return transcript for petitioner's 2006 personal income tax return, electronically filed on April 15, 2007, which was the last return filed before the issuance of the Notice of Deficiency herein.

4. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page 7 of the 16-page CMR contains information on the notice in issue and lists an initial date of July 11, 2007.¹ Following general practices, this date was manually changed to the actual mailing date of "7-23-07," or July 23, 2007. Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Page 7 of the CMR establishes that a notice with the control number 7104 1002 9730 0190 9575 and reference number L 028450344 was sent to petitioner at her Brooklyn, New York, address.

5. The affidavit of James Steven VanDerzee, the mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the

¹ The CMR specifically states "20071921700" or year 2007, day 192 at 5:00 P.M.

number on the CMR. A review of the CMR submitted by the Division confirmed that a USPS employee marked pages 1 through 16 of the CMR with his initials and the USPS postmark. On the final page, corresponding to “Total Pieces and Amounts,” is the number 175, which has been circled, and a short distance to the right of this number are the handwritten initials of the USPS employee, confirming that all notices were received by the USPS. The USPS postmark is from the Colonie Center branch and bears the date July 23, 2005, confirming that the notices were mailed on that date.

6. Petitioner’s Brooklyn, New York, address on the CMR, the notice and its cover sheet matches the address listed on petitioner’s 2006 personal income tax return: 185 Jerome St. 1, Brooklyn, NY 11207-2707. This was the last return petitioner filed with the Division before the issuance of the notice.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Where the timeliness of a Request for Conciliation Conference or petition is at issue, as here, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To prove the fact and date of mailing the subject notice, the Division must show the following:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*)

C. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice on the day it was dated, July 23, 2007, to petitioner's last known address. The submitted affidavits establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the notice, its cover sheet and the CMR conforms with the address on petitioner's 2006 personal income tax return, filed April 15, 2007, thereby satisfying the "last known address" requirement in Tax Law § 681(a). Petitioner offered neither argument nor proof either disputing the evidence introduced by the Division or alleging nonreceipt. Therefore, it is concluded that the Division properly mailed the notice to petitioner's last known address, and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on July 23, 2007 (Tax Law § 170[3-a][a]; § 689[b]).

D. Petitioner's Request for Conciliation Conference was received on February 1, 2008, a date far beyond the 90-day period for protesting the notice and, therefore, is untimely. Consequently, the Division of Tax Appeals has no jurisdiction to hear this matter (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005) and must grant summary determination in favor of the Division of Taxation.

E. Finally, it is observed that petitioner may not be without some remedy. She may pay the tax and file a claim for refund (Tax Law § 687[a]). If the refund claim is disallowed, she may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).

F. The Division's motion for summary determination is granted, and the petition of Andry K. Ramirez is dismissed.

DATED: Troy, New York
October 30, 2008

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE